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In the Supreme Court of the United States

OCTOBER TERM, 1987

SYLVIA E. DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under the circumstances of this case, petitioner was entitled to the appointment of a civilian psychiatrist to conduct a psychiatric examination and to assist her at trial.

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OPINIONS BELOW

The order of the Court of Military Appeals affirming petitioner's convictions (Pet. App. 1a) is noted at 24 M.J. 222. The opinion of the United States Navy-Marine Corps Court of Military Review (Pet. App. 2a-12a) is reported at 22 M.J. 829.

JURISDICTION

The judgment of the Court of Military Appeals was entered on May 6, 1987. A petition for reconsideration was denied on August 21, 1987. The petition for a writ of certiorari was filed on October 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Petitioner, a member of the United States Navy, was tried before a special court-martial at the Pearl Harbor

Naval Base in Hawaii.[1] She was convicted of a number of disciplinary infractions, including disobedience of a commissioned officer's orders, disrespect and insubordination toward noncommissioned officers, and the communication of threats, in violation of Articles 86, 89, 90, 91, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 886, 889, 890, 891, 934. Petitioner was sentenced to a reduction in grade, confinement for 45 days, forfeiture of $200 in pay per month for six months, and a bad conduct discharge. The convening authority and the supervisory authority approved the findings and sentence. The court of military review affirmed the convictions but modified the sentence by setting aside the bad conduct discharge. The Court of Military Appeals remanded the case for further proceedings before the court of military review. After the completion of the remand proceedings, the Court of Military Appeals affirmed petitioner's convictions without opinion (Pet. App. 1a).

1. The charges against petitioner arose out of a series of acts of insubordinate behavior on her part in February, March, and April 1983. The acts consisted of using disrespectful language to a commissioned officer, disobeying a commissioned officer, using disrespectful language to five superior petty officers, disobeying two superior petty officers, being absent without permission from her place of duty, refusing to prepare her military wardrobe for inspection, making threats against three other servicemembers, and assaulting two superior petty officers. Pet. App. 2a-3a.

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[1] A special court-martial is empowered, under Article 19 of the Uniform Code of Military Justice, 10 U.S.C. 819, to try any noncapital offense, but the maximum penalty that a special court-martial may impose is limited. With respect to an enlisted servicemember, the punishment imposed by a special court-martial may not exceed confinement for six months, hard labor without confinement for three months, forfeitures of up to two-thirds of the servicemember's pay for a period of six months, and a bad conduct discharge.

Pursuant to a provision of the *Manual for Courts-Martial* that was then in effect, petitioner's counsel moved on April 21, 1983, for a mental examination to determine her competency to stand trial and her mental responsibility at the time of the incidents that resulted in the charges against her. The request was granted, and a sanity board was promptly convened to examine petitioner. The board, which consisted of two Navy psychiatrists at the Regional Medical Center at Pearl Harbor, reported its findings on April 22, 1983. The examining psychiatrists both concluded that petitioner suffered from a borderline personality disorder, but that she did not lack the capacity to appreciate the criminality of her conduct. They further concluded that petitioner did not lack substantial capacity to conform her conduct to the requirements of the law, and that she possessed sufficient mental capacity to understand the nature of the proceedings against her and to cooperate intelligently in her defense. AX 10.

Following the receipt of the report from the sanity board, the military judge held a hearing on April 28, 1983, on petitioner's motion to have petitioner declared incompetent to stand trial. At the hearing, one of petitioner's lawyers testified that during his interviews with petitioner, she was at times unresponsive and at times responded to questions in what he regarded as an inappropriate manner (Tr. 65). One of the psychiatrists on the sanity board then testified that, based on petitioner's personal history, his interviews with her, and tests he and the other member of the sanity board had administered, he believed that petitioner's personality disorder might affect her cooperation with counsel, but that it would be as a matter of choice on her part, and not as a result of a condition over which she had no control (Tr. 75). The psychiatrist testified that he had found in petitioner no evidence of delusional thinking, hallucinations, or the type of gross disorganization of thought processes that would

be associated with psychotic disorders (Tr. 78-79). He added that persons with borderline personality disorders might "look crazy" for short periods of time, but that such persons retain the ability to compose themselves if they choose. When petitioner wanted to be, the psychiatrist testified, "she could be very cooperative, very coherent, very lucid, very appropriate" (Tr. 81). Based on that evidence and his own observations of petitioner in the courtroom, the military judge determined that petitioner could cooperate with her counsel if she chose to do so; the judge accordingly ruled that petitioner was competent to stand trial (Tr. 89).

Petitioner's counsel then made an oral motion for the court to appoint a civilian psychiatrist to interview petitioner (Tr. 89). Counsel argued that petitioner's conduct before the court indicated that since the time of the sanity board examination a week earlier, petitioner's condition might have deteriorated, and that another examination should be conducted (Tr. 90). Counsel argued that petitioner "should be allowed the opportunity to get a second opinion. The second opinion of a person outside the military community" (*ibid.*).

The government responded that petitioner had not made a sufficient showing to justify the appointment of a civilian expert. Government counsel noted that petitioner's counsel had not pointed to any specific evidence that petitioner's condition had worsened since the sanity board examination, and he noted that the sanity board psychiatrist had testified that it was extremely unlikely that petitioner's condition would have deteriorated during that period of time. Tr. 89-90.

The military judge denied the motion for the appointment of a civilian psychiatrist to examine petitioner. The judge stated that "[a]t this juncture, I perceive no need, nor any underlying basis for such an order" (Tr. 90). The judge added, however, that "should the accused desire to

do so on her own initiative or upon her own resources, I'm prepared to order that the accused be produced at reasonable times and opportunities, but I decline to direct any further mental status evaluation of the accused, at this juncture" (*ibid.*).

2. Following her conviction, petitioner took an appeal to the Navy-Marine Corps Court of Military Review. Petitioner argued in that court that the military judge had erred when he denied petitioner's motion for examination by a civilian psychiatrist at government expense. At the time the military judge decided that question, the court concluded, he did not abuse his discretion by denying petitioner's request. The court also rejected petitioner's claim that she was incompetent to stand trial. With respect to the sentence, however, the court agreed with petitioner that a bad conduct discharge was inappropriate under the circumstances of this case. The court noted that although petitioner's offenses were "generally serious and wholly inexcusable," the opprobrium resulting from a bad conduct discharge was not warranted in light of the "emotional and mental problems" from which petitioner suffers. The court therefore modified petitioner's sentence by vacating the bad conduct discharge. *United States* v. *Davis*, No. 83-5411 (N.M.C.M.R. Dec. 14, 1984).

3. On review, the Court of Military Appeals vacated the judgment of the court of military review and remanded the record to that court for further consideration in light of the intervening decision of this Court in *Ake* v. *Oklahoma*, 470 U.S. 68 (1985). On remand, the court of military review again affirmed petitioner's convictions.

In its opinion on remand, the court of military review held that the procedures employed by the military judge in this case were sufficient to satisfy the requirements of *Ake*. The court found that although petitioner's sanity was a "significant factor" at trial (Pet. App. 6a), the military judge did not abuse his discretion by refusing to order the

appointment of a civilian psychiatrist to examine petitioner and to assist in her defense. The court held that under the provisions of military law in effect at the time of petitioner's trial, a military judge could appoint a sanity board to examine the defendant if there was a reasonable basis for a psychiatric inquiry. See *Manual for Courts-Martial, United States – 1969* para. 121 (rev. ed).[2] In addition, the court noted (Pet. App. 6a-7a), the military judge was authorized to appoint an expert for the defense at government expense, which provided "a route for an accused to seek reasonable funding for a psychiatrist of the accused's own choice" in appropriate cases. See *Manual for Courts-Martial, United States – 1969* para. 116 (rev. ed.); see also Art. 46, UCMJ, 10 U.S.C. 846.[3] Those provisions, the court concluded, gave all defendants in the military system a right to the same access to psychiatric assistance and evaluation that this Court in *Ake* guaranteed to indigent defendants in the civilian criminal justice system. Pet. App. 7a-8a. The sanity board was a neutral body of psychiatric experts, the court observed, and in appropriate cases the accused could also obtain the appointment of another psychiatrist to assist the accused under "the readily-available provisions of paragraph 116 [of the 1969 *Manual*]" (Pet. App. 8a).

The court of military review concluded that the application of the pertinent provisions of military law did not deny petitioner due process (Pet. App. 8a-12a). At the time he denied petitioner's request for the appointment of a defense psychiatrist, the military judge had heard

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[2] The military judge's authority to appoint a sanity board is now set forth in Rule 706, Rules for Courts-Martial, *Manual for Courts-Martial, United States – 1984*.

[3] The military judge's authority to appoint expert witnesses to assist the accused is now established by Rule 703(d), Rules for Courts-Martial, and Mil. R. Evid. 706(a), *Manual for Courts-Martial, United States – 1984*.

testimony about petitioner's conduct, had observed her in court, and had heard testimony from the psychiatrist who had served as the head of the sanity board and had examined petitioner at length. In the face of testimony from the psychiatrist that petitioner was not psychotic, petitioner's counsel "submitted nothing specific but generally argued that [the psychiatrist] had misdiagnosed [petitioner], that her condition had changed since the last time [the psychiatrist] observed her, and that her actions in court were not known to [the psychiatrist] and contradicted his diagnosis." Pet. App. 11a. Under the circumstances of this case, the court concluded, petitioner had not satisfied her burden under paragraph 116 of the 1969 *Manual* to establish the need for an expert's assistance. Pet. App. 11a-12a (quoting *Caldwell* v. *Mississippi*, 472 U.S. 320, 323-324 n.1 (1985)). In light of the extensive observation, testing, and evaluation of petitioner, the court noted, misdiagnosis by the sanity board was unlikely, and the psychiatrist in his testimony "unequivocally demonstrated the lack of validity in [petitioner's] proposition that her condition had changed between the inquiry board and trial" (Pet. App. 12a). In the absence of any factual support for petitioner's motion, the court concluded, "we are simply unpersuaded that the motion was anything more than an attempt to 's[h]op around' for a psychiatrist who might favor the defense" (*ibid.*).

Following the decision of the court of military review on remand, the Court of Military Appeals affirmed petitioner's convictions in a brief order (Pet. App. 1a). The order simply stated that the decision of the court of military review would be affirmed in light of the Court of Military Appeals' decision in *United States* v. *Mustafa*, 22 M.J. 165 (C.M.A. 1986), cert. denied, No. 86-143 (Nov. 20, 1986).

ARGUMENT

Petitioner argues that the military courts denied her access to a qualified psychiatrist to assist her in presenting an insanity defense, in violation of the Due Process Clause and this Court's decision in *Ake* v. *Oklahoma*, 470 U.S. 68 (1985). To the contrary, the military courts have interpreted *Ake* correctly – indeed, generously – and have held that the military justice system authorizes the appointment of a competent psychiatrist to assist the accused upon request in appropriate cases, even in the absence of proof that the accused is indigent. In this case, however, petitioner did not make a proper request for such assistance, and she did not establish the need for the appointment of a civilian expert; the military judge therefore did not err by denying her application for the appointment of a psychiatric expert from outside the military to assist in the presentation of her defense.

In *Ake*, this Court held that when an indigent defendant demonstrates that his sanity is to be a significant factor at trial, the State must assure the defendant access to at least one competent psychiatrist to conduct an appropriate examination and assist in the preparation and presentation of the defense (470 U.S. at 83). The rationale underlying the Court's decision in *Ake* was that psychiatric evidence can be so important in a case that turns on the defendant's mental condition that the assistance of a psychiatrist may be crucial to the defendant's ability to marshal a defense (*id.* at 80); without the assistance of a psychiatrist, the Court concluded, an indigent defendant may be so disabled from presenting a defense based on his mental condition that "the risk of an inaccurate resolution of sanity issues is extremely high" (*id.* at 82).

Contrary to her claim, petitioner was not denied any relief to which she was entitled under *Ake*. Unlike the defendant in *Ake*, petitioner had the benefit of a psychiatric examination by two neutral psychiatrists – the members of

the sanity board convened by the military judge. To be sure, those two psychiatrists reached conclusions that did not support petitioner's claim of insanity, but *Ake* does not guarantee a defendant the assistance of a psychiatrist who will reach the conclusion the defense wishes. *Ake* guarantees only that an indigent defendant in a case raising a serious issue of mental condition will have access to a competent psychiatrist to examine and evaluate the defendant. If the psychiatrist who examines the defendant concludes that the defendant is not insane and was not insane at the time of the crime, the state has no obligation to provide the defendant with access to a succession of different psychiatrists until the defendant finds one who will give testimony supportive of his defense. See *Ake*, 470 U.S. at 79, 83.

Petitioner now contends that the examination conducted by the members of the sanity board fell short of satisfying the requirements of *Ake* because the psychiatrists who examined her were not made available to assist her in the preparation and presentation of her defense. The short answer to that claim is that petitioner did not request that a psychiatrist be made available to her for that purpose.

In his brief oral motion for the employment of a civilian expert (Tr. 88), petitioner's counsel did not suggest that petitioner needed an expert for assistance in the presentation of her defense. Rather, counsel stated that he was dissatisfied with the conclusion reached by the sanity board and wanted to hire a civilian psychiatrist from whom he could obtain a "second opinion" that might be more favorable to petitioner. *Ake*, however, does not provide a basis for any such relief. The *Ake* case makes clear that a defendant is entitled to only one psychiatrist appointed by the state; there is no constitutional obligation on the part of the state to provide a "second opinion," much less a "third opinion," which was in effect what peti-

tioner was seeking in this case, since the two psychiatrists on the sanity board agreed that petitioner was both sane and competent to stand trial.

Moreover, the *Ake* case did not give petitioner a right to an examination by a psychiatrist from "outside the military community" as she requested. The psychiatrists on the sanity board were independent of the prosecution; the fact that they were both military doctors did not deny petitioner due process. *Ake* requires only that the State provide an indigent defendant with access to a competent psychiatrist who is not "beholden to the prosecution" (470 U.S. at 83, 85); the Court specifically denied that the Constitution ensures the defendant the right "to choose a psychiatrist of his personal liking or to receive funds to hire his own" (*id.* at 83).[4]

The fact that petitioner did not request the relief provided in *Ake* is clear from both the limited nature of the request that she did make—for an additional examination by a civilian psychiatrist—and the absence of any reliance on provisions of law that might have justified the appointment of an expert to assist her in the presentation of her defense. Petitioner did not claim that the Constitution required the relief she now seeks.[5] She did not even request

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[4] Just as the Sixth Amendment permits the state to provide indigents with attorneys who are state-employed, there is likewise no due process right to the appointment of a private psychiatrist, as long as the psychiatrist, like counsel, is independent of the prosecution. In the military system most defendants, like petitioner, are represented by counsel who are members of the military. It would be incongruous, to say the least, to permit military personnel to serve as appointed counsel, but to require that expert witnesses be drawn from "outside the military community."

[5] Petitioner would not in any event have been entitled to relief under *Ake*, because she did not show that she was indigent, which is a prerequisite for the application of the due process principles of *Ake*. Petitioner does not contest that point, other than to suggest in passing (Pet. 13 n.9) that she "may have" been indigent, since she requested

relief under paragraph 116 of the 1969 version of the *Manual for Courts-Martial*, the provision under which the military judge could have appointed a psychiatrist to examine her, testify on her behalf, and assist her in presenting a defense. Rather, in the application for a second examination that she made to the convening authority (AX 1), she referred only to paragraph 121 of the *Manual*, the provision that authorizes the convening authority or the military judge to order a psychiatric examination. Petitioner's reliance on paragraph 121, rather than paragraph 116, demonstrates clearly that her object was to obtain a second examination, not to obtain the assistance of a psychiatrist in presenting her defense.

If petitioner had requested the relief that she now claims she was denied—the assistance of a psychiatrist in presenting her defense—there is no reason to believe that the military judge would not have given that request appropriate consideration.[6] When a proper request is lodged

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a military lawyer rather than a civilian lawyer, which she said she could not afford. Obviously, a defendant's passing remark that she cannot afford a civilian lawyer falls far short of establishing her indigency for purposes of determining whether she could afford to obtain the assistance of a private psychiatric witness.

[6] That is not to say that the military judge would have been required to grant the motion. The Court in *Ake* held that before the State was obligated to provide psychiatric assistance to the defendant, the defendant had to make a preliminary showing that his sanity was likely to be a significant factor at trial. *Ake*, 470 U.S. at 74; *Caldwell* v. *Mississippi*, 472 U.S. 320, 323-324 n.1 (1985). In this case, the evidence before the military judge at the time he ruled on petitioner's motion suggested that petitioner had emotional difficulties, but it did not suggest any likelihood that she was insane or had been insane at the time she committed the charged offenses. The members of the sanity board concluded that petitioner was not psychotic, and her behavior, although clearly manifesting emotional disturbance, was suggestive of a personality disorder, not legal insanity. Petitioner's subsequent conduct and the subsequent diagnoses of her condition, on which petitioner now relies (Pet. 8), were not before the military judge

and a sufficient showing is made that the defendant's mental condition will be a significant issue at trial, the military courts have held that they would apply the principles of *Ake*, even in the absence of evidence that the defendant is indigent. See *United States* v. *Garries*, 22 M.J. 288, 290 (C.M.A. 1986), cert. denied, No. 86-501 (Dec. 1, 1986); *United States* v. *Mustafa*, 22 M.J. 165, 168-169 (C.M.A. 1986), cert. denied, No. 86-143 (Nov. 10, 1986); 10 U.S.C. 846; Rule 703(d), Rules for Courts-Martial; Mil. R. Evid. 702, *Manual for Courts-Martial, United States – 1984*. In a recent case, the Court of Military Appeals explained that when the facts of the case suggest that the defendant's mental condition will be in issue, the government must provide "a medical officer for assistance in the preparation of its case" if the defendant requests such an appointment. *United States* v. *Toledo*, 25 M.J. 270, 276 (C.M.A. 1987). Thus, contrary to petitioner's claim, the military courts have adopted the proposition that a defendant raising a serious insanity claim is entitled, on request, to the assistance of a psychiatrist in conducting his defense, not just to an objective examination by a sanity board. The military courts have therefore incorporated the principles of *Ake* and have made those principles applicable to every case in the military system. In that respect, the military courts have taken *Ake* considerably farther than has this Court, for they have held that the principles of *Ake* are applicable even in the absence of proof of indigency on the part of the defendant. See *United States* v. *Mustafa*, 22 M.J. at 168-169. There is accordingly no need for review in this case to instruct the military courts to do what they have already done on their own initiative.

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and thus could not have borne on the question whether petitioner had made a colorable showing at that point that her sanity would be at issue at trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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